UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE BEVERLY REID O'CONNELL, U.S. DISTRICT JUDGE

KAROL WESTERN CORP., Plaintiff, vs. SMITH NEWS COMPANY, INC., dba SMITH NOVELTY COMPANY, Defendants.	Case No. CV 12-7695 BRO (VBKx)

REPORTER'S TRANSCRIPT OF
MOTIONS IN LIMINE
MONDAY, MARCH 3, 2014
1:39 P.M.
LOS ANGELES, CALIFORNIA

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LOS ANGELES, CALIFORNIA; MONDAY, MARCH 3, 2014

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THE COURTROOM DEPUTY: Case No. CV 12-7695 BRO, Karol Western Corp. versus Smith News Company, Incorporated.

Counsel, state your appearances, please.

MR. BRUCKER: Good afternoon, Your Honor. Michael Brucker appearing on behalf of defendant.

MR. BRUNSTEN: Donald Brunsten and Bruce Ishimatsu appearing on behalf of the plaintiff.

THE COURT: Good afternoon, folks.

All right. We're here for the motions in limine. I've read and considered the motions in limine. Basically, we're going to start with Karol Western's Motion in Limine No. 1, the independent creation defense.

Let me tell you what my tentative is, and then -- please be seated. You don't have to stand the entire time.

Let me tell you what my tentative is, and then I'll permit the opposing party to be heard. Please don't repeat your papers. And then we'll go to any brief questions I have from the movant so -- if I'm going to deny it.

With respect to the independent creation defense, here's the problem. In the motion for summary judgment, there were genuine issues as to independent creation. So I'm inclined to deny.

So let me hear from Karol Western as to why I shouldn't stand by what I said in the motion for summary judgment, really.

MR. BRUNSTEN: Thank you, Your Honor. Um, it's a threefold problem. First, we have the local rule.

THE COURT: Right.

MR. BRUNSTEN: And there's a debate between the parties as to whether or not independent creation is an affirmative defense.

What I want to point out on that is Ninth Circuit Model Jury Instruction 17.0, which was not included in our papers and that's why I'm bringing it up now, is very, very clear and makes it abundantly clear that independent creation is an affirmative defense. It's the last paragraph of that Model Jury Instruction. And independent creation is treated just the same as the affirmative defense of fair use or the affirmative defense of abandonment of copyright.

So we're going to start with that premise, that it is an affirmative defense. And then we'll get on to the next part you're talking about, which is what your -- your ruling was in the summary judgment motion.

THE COURT: Okay. Let's pause a moment. I'm looking at 17.0.

MR. BRUNSTEN: Last paragraph.

THE COURT: Okay. Go ahead.

MR. BRUNSTEN: So with that said, we think that the local rule applies and it ought to have been pleaded or otherwise be considered waived in this case.

So then the next question is: Is there a good reason in the interest of justice to override what the local rule requires here? And we think that there is.

First of all, because of the admissions that were made by the defendant's witnesses after the summary judgment hearing in which they basically said, look, you know, Mr. Glaser, who clearly had seen our work ahead of time, was the one who made all the important creative choices in the accused work; and number two, the antecedent works, the precursor works that they claim they relied on are just, you know, not even remotely -- do not even remotely resemble the accused work. Other than the fact that they share the -- a representation of the Las Vegas sign, you know, there's no resemblance otherwise.

So we think that if that's the evidence that they have and that's the state of the evidence, then there certainly would be a motion for directed verdict or --

THE COURT: Well, we're not even close to that.

MR. BRUNSTEN: Well, I understand. But I'm just saying that in the interest of streamlining the case, which I heard you mention a moment ago, you know, that this is a --

THE COURT: Judges love that word, "streamline" the case.

MR. BRUNSTEN: Well, I can understand the appeal. But the -- the -- you know, this -- this particular defense, independent creation, is really a dead letter, we think.

And then finally, there's the Court's own ruling in the summary judgment motion that found striking similarity between the plaintiff's flask design and the defendant's flask design.

THE COURT: Yeah. But to be fair, I did find issues as to independent creation.

MR. BRUNSTEN: Right. But the point I was going to make is that reading the cases on striking similarity, what they say and what *Nimmer* also says is that, by definition, "striking similarity" means that -- that it is illogical --

THE COURT: Right.

MR. BRUNSTEN: -- to conclude that they were independently created.

THE COURT: Right. I understand.

MR. BRUNSTEN: So there's a legal reason, there's a factual reason, and then there's the local rules. So that's the basis for our argument.

THE COURT: Thank you.

Let me -- let me hear from the defense on this, Smith News Company, as to -- I looked at 17.0. And it does -- and counsel's right, it does say "Defenses to infringement," and then it goes on to say "independently created." So let's -- if you could address that, please, and then tell me why I should

let you present evidence.

MR. BRUCKER: Well, first of all, I'd point out that the Appendix A to the Court's local rules says that you should only identify an affirmative defense in those matters which defendant bears the burden of proof and are matters that would defeat plaintiff's claim even if plaintiff established the elements of the claim.

Now, if plaintiff established -- and I think what they're talking about is such a thing as the statute of limitations. You could make your case, you could get -- have all the elements of your claim proved. But if you violated the statute of limitations, that would have to be affirmatively pled.

THE COURT: I see what you're saying. It doesn't place the burden of proof upon you. It defeats the elements that the plaintiff has to prove by independent creation, so it would fall under the local rule.

MR. BRUCKER: Right.

THE COURT: Okay. All right. I am not persuaded to exclude the evidence. I'm going to permit -- deny the motion in limine and permit the -- permit evidence of independent creation. I find that it does not place the burden -- it does say defenses, but it -- it negates the plaintiff's burden of persuasion. So I'm denying the motion in limine.

As to motion -- let's go to Motion in Limine No. 2. And this really centers on 2-D versus 3-D. And that centers on,

you know, what is this case about? This is the way I'm viewing this. It's not about purple flasks with shiny sparkly paper on it. Okay? Because a flask is a flask is a flask. It's about the images on here.

And so let me tell you that I am disinclined to let you use the flask. However, I am not going to require you -- because you had a blurry image on the -- that you submitted.

Let me ask you a question factually.

MR. BRUNSTEN: Yes.

THE COURT: You have to have some of these sparkly purple things that are not on a flask.

MR. BRUNSTEN: Well, let me take a step back for a second. We --

THE COURT: Don't take a step back. Answer my question because it's going to go a lot more smoothly if you answer my question. Because I am disinclined to permit a 3-D image. I am inclined to permit a 2-D image, but I am inclined to permit you to have a representation.

MR. BRUNSTEN: Well, what we could do, the way it would -- and this is consistent with the -- the supplemental -- or amplification documents that we filed -- is if you took it off the flask, you would still have a reflective metal backing behind it. That's how we described the work in our -- in our amplification. And as a matter of fact, if you for a second -- give me the flask -- I mean the tumbler.

Your Honor, this case also involves the same design applied to tumblers. Now, the tumbler is actually the -- behind -- behind the glitter fabric -- I could show you this too. We haven't put it into evidence. If you'd like to see it up close, that might help you.

But the -- the -- there's actually a layer of metallic fabric. Because this is a plastic tumbler; it's not metal like the flask. So there's a layer that's inserted behind the glitter fabric layer in this. And that's what creates -- that's what makes this tumbler look exactly like the metal flask.

So you could take off the glitter fabric, you could take off the metallic layer between it, and you would show those two together. And that's what it would look like off the flask.

But the -- in the case of the flask, it's more a matter of conceptual separability, which is what the statute allows, is that the -- the -- you would have to show -- you would have to put a similar metal backing behind it, and then it would just be more or less a rectangular design with the metal backing behind it. And you could still see that it has the effects of the glitter, the effects of -- of reflection. Those are the things that make this -- this design sell. That's why this design is popular. It's not simply because it's an outline of the Las Vegas sign. It's because of these other visual effects which are combined together.

THE COURT: But, you know, a tenet to copyright law is that it's the expression of it. And the functionality of the flask -- I mean, it's incredibly prejudicial for a jury to look at two purple flasks and think because they're flasks, that it's an infringement. That's not -- that is not appropriate for this --

MR. BRUNSTEN: Well, the Court even said, I believe, in its summary judgment order that -- that there can be a flask-to-flask comparison -- that was the basis for the summary judgment order -- and that --

THE COURT: That was not a motion to admit evidence.

MR. BRUNSTEN: Right.

THE COURT: That was --

MR. BRUNSTEN: But what I'm saying is the jury can be instructed that -- and this is the way it was done in all the -- the pictures of all the other cases we cited, the *Coquico* case, *Collezione Europa*, the *Knitwaves* case, the *City Merchandise* case, they were all looked -- they all looked like -- the *City Merchandise* case was the comparison of the piggy bank with the piggy bank. And it shows the designs on it. So that's -- that's how it's always been done.

And the defendant has not shown us ever, ever a case which endorses the idea of you take it apart, you know, in order to -- to -- because we don't -- what 17 U.S.C. 101 says is not that the -- that the -- that the design can't be on a useful

article. It says that the non- -- there has to be either physical or conceptual separability from the non- -- from the utilitarian features of the useful art. And the reflectivity of the metal is not a utilitarian feature of the flask.

And it's -- in any event, the design is conceptually separate, much like the *Collezione Europa* case which also involved metal furniture, designs applied to metal furniture, which the Court said can be conceptually separable --

THE REPORTER: Excuse me. Please slow down.

MR. BRUNSTEN: I'm sorry. They didn't have to rebuild the furniture or remake the furniture or invent a new version of the furniture. They just looked at the furniture. And they could see that conceptually that they are separable, and that is enough to meet that test.

And it is -- you know, the jury can certainly be instructed to not consider the flask as a flask as part of the -- of the claimed work. But that still -- they still need to be able to see what makes this design -- what it looks like in real life because that's the way the design was made.

THE COURT: All right. Well, let me hear from the defense on this.

MR. BRUCKER: Am I correct, Your Honor, what you're suggesting is that plaintiff produce something such as this, which was Exhibit 61 that's been lodged with you, and that this be the comparison that the jury use to determine if there's

been copyright infringement?

THE COURT: That is what I was saying.

MR. BRUCKER: And I would say -- over the weekend, I happened to run into an Eleventh Circuit case. It is not reported, but it is extremely on point in which the Court makes the analysis. And I believe their -- I believe their method of determining separability is one that is very workable, especially in this case.

And the case basically says -- it had to do with a light fixture. And it says if you take everything away from the work that is required for the function of the -- of the useful article, in this case would be the flask, what you have left is what is subject to copyright. And it went on to say that the plaintiff there asked that the -- that once it was determined there were features that were separable, the plaintiff said, "But we want you to look at it in its entirety, in" -- "as a whole, not just the part you've separated out." And the Court said we can't do that.

THE COURT: Well, what about plaintiff's argument that the jury could be instructed to not regard the items -- don't look at them as flasks, but look at them as the entire representation of the expression?

MR. BRUCKER: It seems to me, Your Honor, that it's like unringing a bell. I mean, why do they have to see it on the flask if, in fact, what's going to be determined by the

jury is whether or not this was copied (indicating).

THE COURT: And you're referring to Exhibit 61 in your right hand.

MR. BRUCKER: Yes. It seems they can't help but think, well, gee, they look alike. No one's going to deny that these two flasks look alike. The issue is whether or not there's something copyrightable about these flasks or the images on the flasks that have been, in fact, copied as opposed to having been independently created.

THE COURT: All right. I'm going to look at the Eleventh Circuit case. I'm going to take that one under submission. You'll hear from me on that.

MR. BRUNSTEN: May I just give one --

THE COURT: Here's the way --

MR. BRUNSTEN: -- one ten-second observation on that, please, Your Honor, and then I'm happy to move on. My only --

THE COURT: Ten seconds and -- let me just explain to you folks something. I have rules for a reason. One, don't talk over me, which you've done twice now. Two, I'm going to give you time limits. I expect you to adhere to them. And another ten seconds here and another ten seconds there comes another day.

So if you can't follow the rules, we're not going to have -- we're not going to be able to get along very well.

MR. BRUNSTEN: Very well, Your Honor.

THE COURT: Okay.

MR. BRUNSTEN: May I speak, or should I wait?

THE COURT: I'm going to take it under submission. Okay? This is not a ping pong match. You all have submitted a lot of written materials. There are ten motions in limine I've got to get through, and then I've got ten more right after you. So if it's not in your papers, it should have been. Okay?

All right. Let's go to 3. Let me tell you what is going on in 3. I don't have a proffer as to what this witness is going to say. And I am not prepared -- without knowing what this witness is going to say specifically, I'm not going to rule on it. I cannot rule in a vacuum, and I have no idea as to -- first of all, substantial similarity, I'm disinclined to let anybody testify to. But industry standards, I don't know what you're talking about.

So maybe the defense can help with that, provide some sort of proffer. But at this point, I don't have enough information to rule.

MR. BRUNSTEN: May I be heard on that one, Your Honor?

THE COURT: Well, I said I want to hear from the defense first. I want to hear -- the defense is presenting expert opinions, so presumably they know what someone's going to say.

MR. BRUCKER: Your Honor, we have never offered any expert testimony. We have not named an expert.

THE COURT: Well, what is Mr. Glaser or Mr. Urbiztondo -- are they going to testify about industry standards?

MR. BRUCKER: Not that I know of. They're going to testify about what they know and what they've seen.

THE COURT: Okay. Then the motion in limine is granted. There will be no evidence regarding substantial similarity or industry standards. Granted.

MR. BRUCKER: I assume that's from anybody?

THE COURT: Well, I don't know where the other motion is -- if it -- we'll get to that motion in limine.

MR. BRUNSTEN: There's another half to that motion. I appreciate what Your Honor just said with respect to the industry standards question.

The other -- the other aspect of that motion was that because the defendant has not provided an expert witness, they -- we feel that they should not be able to offer into evidence through counsel's argument in closing -- you know, counsel's argument or closing argument in the case their alternative dissection of the work.

We have Professor Sedlik's dissection, which they can go out and take his deposition, they can cross-examine him on that. We feel that they -- they can't just not have a witness

and then just put forth a dissection of the work by way of counsel's own argument, in effect making him the expert witness.

So we -- if they have a dissection that's different from ours, an alternate to ours, then they need a witness that we can cross-examine.

THE COURT: No, they don't. You are conflating two issues.

And I'm not prepared to rule about closing argument because, as you well know, Counsel, closing argument has to be based on the evidence presented at trial. We're not at trial. I've heard nothing. But they can, through their cross-examination of your expert, establish certain facts that they can then argue to the jury as a reasonable inference. I don't know what that's going to be.

So I am not precluding any closing argument at this time. If you wish to renew it at the close of evidence, I will consider it then. But I simply -- you're asking me to offer an opinion, and I refuse to do it.

But the rules of evidence permit closing argument to be based on reasonable inferences from the -- from the evidence presented. I could agree with you wholeheartedly depending upon what the evidence presented is. I just don't know what it's going to be.

MR. BRUNSTEN: Well, we've seen in their moving

papers that they claim -- they've done their own dissection, counsel for the defense has done his own dissection in which he says that the design consists of only four elements. Okay.

So that's my point, is that if he's going to try and make that his own argument based on his own dissection, we need a witness to cross-examine. Whatever comments they want to make about Professor Sedlik's analysis is fine. We understand --

THE COURT: You're not -- I'm not at that point where I can --

MR. BRUNSTEN: I understand.

THE COURT: I can't rule on that because there's been absolutely no evidence admitted yet. Once all the evidence is admitted, then I will consider that argument.

MR. BRUNSTEN: Thank you.

THE COURT: Okay. So let's go to the next motion in limine.

Karol Western is moving to preclude reference to the idea or subject matter of the Shanghai Diamond.

Okay. I am inclined to deny this. So why don't you tell me why I should grant this motion.

MR. BRUNSTEN: Well, simply because the -- the idea -- the cases talk in visual artworks more about there being a subject matter than an idea. And so the -- the dichotomy involved is the subject matter versus the expression dichotomy.

THE COURT: Well, and I -- you know, a die cut image of the sign is an idea.

MR. BRUNSTEN: No. We think that that's -- that the die cut aspect of that is -- represents a statement about part of how -- the idea of putting the sign on the flask, to use the Court's statement of it in the summary judgment order, that the -- the idea is the sign on a flask. How you do it, whether you use die cut, whether you use neon light, whether you use paint, whether you use -- those are all expressive choices, not -- not the idea. That's -- that's -- and that's not even -- and it's inconsistent with what the defendant itself said before when it defined the idea for the purposes of the summary judgment motion.

So I don't know why the idea would be more inclusive and include more expressive elements now when all parties looked at it differently before because nothing has changed. And, you know, the -- the how to do something is the expressive side of the dichotomy. What's the subject matter, that's the unprotected subject matter or idea. And that's why I say we -- when you call it the subject matter, it becomes more clear as to what -- what -- you know, where the dividing line it.

THE COURT: Let's hear from the defense on this. The plaintiff makes a good point, that the subject matter or idea is the Las Vegas sign, but the expression is the glittery paper on the flask on a cup. So talk to me about that, please.

MR. BRUCKER: Well, I think I --

THE COURT: Because a die cut image of the sign, as plaintiff argues to me, is a -- it conflates two different portions. One is the idea of the sign, and the expression is the die cut image -- die cut image of the sign in -- on glittery paper backed by reflective backing, which is an expression.

MR. BRUCKER: Well, that kind of puts the rabbit in the hat. The question is -- because --

THE COURT: I don't understand the rabbit going in the hat. So --

MR. BRUCKER: Well, it means the -- the definition subsumes the question. In -- in the cases that we've cited, you'll see that the Court defines the idea in quite detail -- in great detail. And the reason for that is because they're -- the public policy behind copyright law is not to grant 75-year monopolies on things that should be open for others to interpret and to -- and to bring forth in a different expression.

The -- the use of a die cut is a common practice. And all of -- the next thing they'll want to do is get a copyright on something that uses paint. I mean, that's a choice, to use paint or to use ink or to use a decal.

But in this case, what you -- what you see is what there is, and that is it's a representation of the sign, executed in

a die cut -- with a die cut method to create this image. And that's what the -- that's the description of the image. That's how you describe the image. This is not an image of ink. This is not an -- I mean, it could be. The same image could be created in ink. It would be the same image.

THE COURT: Why is not -- the execution part of the expression not the idea?

MR. BRUCKER: It -- it can be. You can define it any way you want. They've asked to define it that the idea was the sign itself, just the sign, not even an expression of the sign. But the cases typically define -- in -- in *Data East versus Epyx*, the Court named 15 elements in -- in describing what the work was. It was a karate game, and they had --

THE COURT: I'm familiar with it.

MR. BRUCKER: Yes.

THE COURT: The karate game and --

MR. BRUCKER: Yeah. And in --

THE COURT: But unfortunately, we don't have the video, so I couldn't analyze it myself. I just have the Court's recitation of the multiple factors.

MR. BRUCKER: In the -- in the *Mattel* case, it wasn't just any doll. It wasn't a doll. It was a bratty doll. That was the expression -- that was the -- the genre that it fit into. It wasn't just any doll. It was a bratty doll, which incorporates everything that you would expect to see in a

doll that's supposed to represent a bratty -- to express that.

And the Court went on to say that almost all of the features that the plaintiff relied upon for -- for -- to distinguish it were what you'd expect to find in a bratty doll.

So I think that the public policy of limiting copyrights as opposed to patents, design patents, calls for a description of the work as it is. And that's what this is.

I think it should go further. I think it should be a die cut image of the sign on glitter paper.

THE COURT: That's not going to happen.

MR. BRUCKER: Well --

THE COURT: So -- all right. I'm going to deny the motion. The die cut portion of it does not reflect the expression but rather the idea.

MR. BRUNSTEN: Wouldn't that be the -- I mean, you're granting the motion. That was our argument.

THE COURT: I'm denying the motion. So I am -- excuse me. I'm denying the motion because I think that -- I agree with the defense argument on this. And it's not on glitter paper, as they're asking, but -- I'm denying the motion.

All right. Motion in Limine No. 5, Docket 83. Okay. Evidence or argument of merger or scenes a faire doctrine as not being pled.

I am inclined to deny this. So you can tell me why I

should reverse that tentative.

MR. ISHIMATSU: Good afternoon, Your Honor. Bruce Ishimatsu for plaintiff --

THE COURT: Okay.

MR. ISHIMATSU: -- on this motion.

Um, I -- I have nothing new to offer other than to highlight in the papers that -- the issue about whether it's an affirmative defense. We think that the rules say that they are. It was not pled as such. If -- if it were sufficient to include this kind of argument, doctrine, defense, whatever you want to call it, there would be no need for affirmative defenses, and we all know that there is.

Um, the -- the defendant raised this argument in the summary judgment motion. The Court found it to be meritless --

THE COURT: Just because I find it meritless doesn't mean that it should be precluded from being presented to a jury. I mean, I was not persuaded by it in the context of a summary judgment motion. Okay?

MR. ISHIMATSU: Understood, Your Honor. But the -- the arguments are the same. So it -- if it has a place in this case, whether it be before the jury or otherwise, we think that the Court has found it otherwise, meaning that it is not appropriate. And we would urge that that be the logic applied here.

The rest is set forth in our papers, Your Honor. We think

that this is a -- the defendant is arguing again that there's been a -- a change in the substantial similarity test under *Roth*. And I think the Court has decided that that is not the case, certainly in not only the summary judgment motion ruling but the motion for reconsideration denial last week.

So we think that that argument by the defendant should be rejected.

THE COURT: All right. I think the differing contexts of the Court's ruling is dispositive. I'm going to permit them to raise those issues at trial.

All right. Now, you're seeking to preclude the defendant from introducing evidence of other manufacturer's use on souvenir products of glitter fabric, glitter fabric with die cut, aside from the accused work.

I'm inclined to grant that motion on two bases: 401 and 403. This is not a trial about the use of glitter fabric. This is not a trial about die cut.

So let's hear from the defense on why I should not grant that motion.

MR. BRUCKER: Your Honor, we would not -- I would not argue against you granting that motion if, in fact, what's going to be tried to the jury is whether or not this die cut image (indicating) of the Las Vegas sign that appears on our goods was copied from their die cut image. The reason that we would put in the other flasks -- and there are many flasks

using die --

THE COURT: I got a lot of them. You lodged them all. I have a lot of flasks in chambers. So I --

MR. BRUCKER: Probably more than you can use in a lifetime.

But the -- the reason we wanted to put them in is to make sure the jury understands that glitter paper with a die cut image on a flask is not something that the plaintiff is entitled to own, regardless of what the image is. If we're going to try this case on the basis that if the plaintiff -- if the defendant persuades the jury that its die cut image of the sign was not copied, that the defendant prevails, then we have no objection to --

THE COURT: Well, that's a very conditional argument. And here's my ruling: It's not relevant under 401. And under 403, even if it were relevant, it is undue consumption of time, confusing to the jury.

Motion is granted.

Okay. Let's go to the defense motions in limine. Prohibiting the plaintiff's designated expert Mr. Sedlik --

Is it Sedlik?

MR. ISHIMATSU: Correct.

THE COURT: Yeah.

-- from testifying regarding substantial similarity or striking similarity. You know, those are legal conclusions of

legal import. Mr. Sedlik is not going to be able to testify as to a legal conclusion. We all know that.

So tell me how it's not a legal conclusion. Tell me -- give me some context for that, please.

MR. BRUNSTEN: Actually, Your Honor, we -- we're fine with having Professor Sedlik instructed not to use the word "substantial similarity" or "striking similarity" as such. He can talk about objective similarity, he can talk about things being nearly identical or identical. That's -- that's fine.

THE COURT: That's fine.

MR. BRUNSTEN: But the -- but the balance of that Motion in Limine No. 1 was basically to exclude all of his testimony. Because according to the defendant, *Roth* doesn't matter anymore.

THE COURT: Okay. All right. Well -- okay. So does the defendant wish to be heard on this? Because I'm not going to permit Mr. Sedlik to testify as to "substantial similarity" or "striking similarity."

MR. BRUCKER: That was our motion, Your Honor.

THE COURT: All right.

MR. BRUCKER: And I consider it granted and thank you.

THE COURT: Granted.

Motion in Limine No. 2. You're seeking an order to

preclude evidence of submissions to the Copyright Office after the filing of this action. Okay.

All right. And this goes back to whether or not it's 2-D or 3-D, I think. Plaintiff argues -- that's where you argue, if I'm not mistaken, about the reflective quality of the paper, if I'm not mistaken.

MR. BRUNSTEN: No, not exactly, Your Honor. It's -- it's -- we say -- when we -- when we filed the -- the Form CA, which is the amplification, it still says 2-D artwork in glitter fabric with a reflective metal backing. And that was my objection with -- when you're talking about whether you look on the flask or not. There is a reflective metal backing even if you just consider it away from the flask.

THE COURT: You can do that with tin foil.

MR. BRUNSTEN: Right. In this case, it would be stainless steel. But you're right as far as that goes.

Um, but -- um, excuse me, but the amplification says 2-D artwork in glitter fabric -- and by the way, I had asked the Copyright Office if it should be considered 2-D or 3-D because there's a depth effect also that you see from --

THE COURT: Yeah, I understand.

MR. BRUNSTEN: So they said no, the way to approach that is to call it 2-D artwork but to indicate in your form that it includes an effective depth. So that's one of the items that we listed in the form. Reflective metal backing

including illumination, depth, and other visual effects from die cutting into the glitter fabric. The artwork is for ornamental application --

THE REPORTER: Excuse me. Please slow down.

MR. BRUNSTEN: Excuse me. The artwork is for ornamental application to 3-D useful articles including, but not limited to, flasks and tumblers. So that's the document, the Form CA that we submitted to the Copyright Office.

One other thing on that is defendant has claimed that that form somehow was rejected by the Copyright Office. That's completely false. It takes more than a year. There's no such thing as expedited service on a Form CA. It can take a year or more to get anything back from the Copyright Office. And the defendant certainly has not produced a shred of evidence to indicate that there was some action taken by the Copyright Office on this registration.

So we're just -- it's there. We're waiting for it, but -- and the Copyright Office has almost no grounds to deny it.

The defendant's main point seems to be that what we were doing in filing this Form CA, which has additional pictures and shows off better what the thing looks like, more than that original 2-D photograph, is that we were actually showing some different work. And I think that we've completely destroyed that argument.

THE COURT: Well, the thing with amplification, my

understanding, is that they have immediate legal effect.

MR. BRUNSTEN: Oh, we agree.

THE COURT: So waiting for the Copyright Office is of no moment to my analysis. So I'm not concerned about that.

MR. BRUNSTEN: Thank you, Your Honor.

THE COURT: Let's hear from the defense as to this issue.

MR. BRUCKER: First, I'd like to correct, Your Honor, I didn't say that they were rejected. I said we have no indication that it was -- it was allowed.

THE COURT: Okay.

MR. BRUCKER: I don't know what this adds to the case. They filed something with the Copyright Office that stalled there. What is it evidence of?

THE COURT: Well, first of all, their first picture was what one might consider to be a little blurry. They're certainly permitted to amplify that. And my understanding of the law is that amplification has an immediate effect.

MR. BRUCKER: I'm not sure where that -- I'm not familiar with that particular --

THE COURT: Let me cite a case to you, *Cosmetic Ideas, Inc., versus IAC/InteractiveCorp*, 606 F.3d 612 at 621, Ninth Circuit, 2010. "We therefore hold that receipt by the Copyright Office of a complete application satisfies the registration requirements." So the amplification, it's a tool

used to, you know, provide additional information in the copyright application which has an immediate effect.

MR. BRUCKER: Was that an amplification application in that case?

THE COURT: I believe it was.

But my question to you is: What is -- what is the gravamen of your objection? It doesn't add anything. Okay? So that's a 403 argument that you're making to me. It's not --

MR. BRUCKER: Well -- I'm sorry.

THE COURT: It's not helpful, and it's trying to -- are you trying to argue that they're seeking to protect different artwork --

MR. BRUCKER: Yes.

THE COURT: -- from the first picture?

MR. BRUCKER: Yes. They're trying to protect a -- what they submitted in the CA form were pictures of the flask, and they -- they want to put the flask before the jury and say that it's been blessed by the Copyright Office, which it hasn't been. So that it's --

THE COURT: Well, no. I thought the plaintiff just agreed to a limiting instruction where the flask itself was not the issue and -- did I misapprehend your argument, Counsel?

MR. BRUNSTEN: No. We completely --

THE COURT: You can stand. You can stand.

MR. BRUNSTEN: We agree with that point, Your Honor.

And also, the Copyright Office has instructed us -- again, I had a -- a long dialogue with one of the copyright examiners.

THE COURT: I don't care about that.

MR. BRUNSTEN: But they told us to -- since -- it's a 2-D artwork for application. The reason we're even submitting I.D. material in the first place but not the best edition of the work is because we fall into that category of 2-D graphic art applied to a useful article. And they don't want the best edition. They only want I.D. material, so the --

THE COURT: Slow down.

MR. BRUNSTEN: -- so the Copyright Office says send in a picture of what it looks like on the article. So that's why we did it.

THE COURT: Okay. Let me hear from the defense as to the final word, please.

MR. BRUCKER: Yes. We have no -- we have no objection to them having a better picture than they sent into the Copyright Office initially. I don't know why they didn't send a better picture in --

THE COURT: We don't need to go there. It doesn't matter.

MR. BRUCKER: Okay. But I'm -- but this CA form -- did you have in mind what it is? Because it's in one of the exhibits. It has four or five pictures of the flask with different views of the flask. And we have a letter that we put

in from the Copyright Office that said a CA form cannot enhance the original submitted identification material. And I don't think they're going to get this. I think that the -- the rules of the Copyright Office will reject this. And --

THE COURT: Well, whatever the Copyright Office -- they haven't acted yet, and they haven't rejected it yet. So I'm going to permit them, subject to a limiting instruction. Okay?

MR. BRUCKER: To -- I'm sorry?

THE COURT: Subject to a limiting instruction.

MR. BRUCKER: That they can put in their application, their CA application?

THE COURT: That they can put in amplification photos. Okay? Subject to a limiting instruction.

MR. BRUCKER: Very good.

THE COURT: Okay. All right. Let's go to -- all right. Let's go to the defense motion to exclude evidence of similarity, substantial similarity or striking similarity between any Shanghai Diamond product of plaintiff and any product of the defendant.

Okay. I am inclined to grant this motion and here's why: Because we've talked -- it's not the products. The problem is it's not the products, it's not the flask, it's not a -- what is it? -- a coffee mug or a -- what do you have? -- a travel mug.

MR. BRUNSTEN: Tumbler.

THE COURT: It's the expression of the die cut design.

So let me hear from the defense first, and then I'll hear a brief response from the plaintiff. So --

MR. BRUCKER: It's our motion.

THE COURT: It's actually your motion. Let's hear from the plaintiff first.

The product portion is -- you have an uphill battle here.

MR. BRUNSTEN: Well, as we said, we're not aware of any cases where this has ever been done before, where, because of this, this notion of separability, that you therefore take the thing apart physically and look at it as if -- you know, as if -- in a way that nobody has ever seen it before. So --

THE COURT: But this is not -- the motion is broader than that. The -- the defense only wants to limit this to 2-D and you want to limit it back to 3-D. That goes back to that argument; right? And it's the expression of the idea, which is protectable.

MR. BRUNSTEN: Right. We agree, but that -- the latter part, yes. But the -- I think what we're saying is that the -- it's not exactly 2-D versus 3-D. I don't think that's really the dividing line here.

What it is is the -- the 2-D design looks a certain way in the flesh. It has a certain appearance. You can -- you can

see what it really looks like. Even if you just -- even if you agree that the flask is not -- there's no copyright over the flask itself, the physical flask, but the way the design looks is -- it has to be seen in context.

And especially that the exhibit -- I think it's Exhibit 61 that the defendant offered -- really denudes this of context because they don't even have a reflective metal backing behind it, which is part of what makes this thing the way -- it looked the way it does.

THE COURT: But you can put a reflective metal backing.

MR. BRUNSTEN: Right, which would at least solve part of the problem.

THE COURT: And I even told you how my fifth grade niece would do it. She put some tin foil on it.

MR. BRUNSTEN: Right. And in a way, that's not altogether different than what's done on the tumbler. But our point is that, still, the -- you know, this kind of abstraction from the real thing -- you know, we've seen pictures of dozens -- not dozens but half a dozen cases that -- that -- where this is the exact same analysis that we're doing in this case. Graphic art applied to a 3-D object is not divorced from the object in order to make the comparison.

The *L.A. Printex* case from this circuit of only a couple of years ago looks at the design -- you know, a graphic design

applied right on the clothing itself. The *Soptra* case, which we also mentioned, says that it would be error to not consider the way the design looks on the product for which it is intended.

THE COURT: All right. I'm going to take this one under submission. I'm going to take a look at those cases.

Let's go on to the next motion in limine, again the testimony of -- is he Dr. Sedlik or Mr. Sedlik?

MR. BRUNSTEN: He's a professor.

THE COURT: Professor.

All right. I think I've addressed this issue in the sense of talking about what the professor can or can't say. But I'm not persuaded that the defense has suffered any prejudice. They took Mr. Sedlik's depo. It was, it appears to be -- the designation and the report appear to be provided in September of 2013, several weeks tardy, but he was deposed. You had the opportunity.

So why don't I hear from the defense on this one first.

MR. BRUCKER: Well, Your Honor, as our paper said, we were -- primarily brought this motion to underscore the fact that the schedule set by the Court was ignored.

THE COURT: Well, the problem is this -- and, frankly, it's -- you're in a situation where you've been bumped around between a couple of judges. And my ruling might be different had I had this case from the beginning. But I expect

lawyers to follow deadlines.

But you didn't -- you haven't suffered any prejudice. I'm aware that it was late. And given the fact that I inherited this case, I'm not at this point going to preclude Professor Sedlik's testimony simply because of that.

So that is denied.

Okay. Let me tell you about scheduling. I'm in trial tomorrow, which I have trials stacked up. So I -- we are not going to start this case on March 25. We'll probably be able to start on March 26. So that's the good news. It's not much later.

I think we're going to be able to get the trial ahead of you done in that time frame. Okay? So March 26, folks. Okay? If there are any -- if the other cases run longer, I'll let you know. But I think we're going to be able to get my 2008 case to the jury by that time frame.

All right. I've taken two matters under submission. You'll hear from us shortly; but otherwise, be prepared and ready to go on 3/26.

Let me tell you how much time you'll have to present your case. Each side will have four hours to present its case. That does not include argument. I will give you a time frame for argument when we get a little bit closer for closing argument after I've -- we're deeper into the case. You'll have half an hour to open, half an hour to open, each side. That's

in addition to your four hours. Okay? And that does not include jury selection. And we'll go over jury instructions prior to opening. Okay?

Yes.

MR. BRUCKER: If I may.

THE COURT: Yes.

MR. BRUCKER: Does the four hours include cross-examination?

THE COURT: Yes. You can spend your four hours doing anything you want.

MR. BRUCKER: Okay. And we are currently scheduled to meet next week, a week from today --

THE COURT: Right.

MR. BRUCKER: -- for the pretrial conference and the jury instructions. Is that still on?

THE COURT: Right. That's why I want to get the jury instructions nailed down and completed before, so you folks can shape your evidence based on the jury instructions. So I still plan on seeing you next week, and we'll go from there.

Anything else from either side? And I'll go over all my procedures next week.

MR. BRUNSTEN: All right. Thank you, Your Honor.

MR. ISHIMATSU: Thank you.

MR. BRUCKER: Thank you, Your Honor.

THE COURT: All right. Thank you.

(Proceedings concluded at 2:27 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, MYRA L. PONCE, FEDERAL OFFICIAL REALTIME COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 16TH DAY OF MARCH, 2014.

/S/ MYRA L. PONCE

MYRA L. PONCE, CSR NO. 11544, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER